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7
8 STATE WATER RESOURCES CONTROL BOARD
9 OF THE STATE OF CALIFORNIA
10

11	_____)	No. _____
12	In the Matter of the Petition of)	
13	CALIFORNIA FORESTRY)	<u>PETITION FOR REVIEW AND</u>
	ASSOCIATION)	<u>REQUEST FOR HEARING</u>
14	For Review of Order)	
15	No. R1-2004-0030 and)	
	No. R1-2004-0016)	
16	California Regional Water Quality)	
17	Control Board, North Coast Region)	
	_____)	

18 Pursuant to Water Code section 13320 and Title 23 of the California
19 Code of Regulations section 2050 *et seq.*, Petitioner CALIFORNIA
20 FORESTRY ASSOCIATION ("CFA") hereby petitions the State Water
21 Resources Control Board ("State Board") for review of California Regional
22 Water Quality Control Board, North Coast Region ("Regional Board") Order
23 No. R1-2004-0030, dated June 23, 2004, adopting General Waste Discharge
24 Requirements ("General WDRs") and Regional Board Order
25 No. R1-2004-0016, of the same date, adopting a Categorical Waiver of
26 Waste Discharge Requirements, both of which are for discharges related to
27 timber harvest activities on non-federal lands in the North Coast Region.
28

1 CFA requests a hearing in this matter.

2 1. Name and Address of Petitioner are:

3 California Forestry Association
4 c/o Mark S. Rentz, Esq.
5 1215 "K" Street, Suite 1830
6 Sacramento, CA 95814
7 Telephone: (916) 444-6592
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9 2. CFA requests that the State Board review Regional Board Order
10 No. R1-2004-0030, General Waste Discharge Requirements for Discharges
11 Related to Timber Harvest Activities on Non-federal Lands in the North
12 Coast Region (the "General WDRs" or the "Order"). A copy of the Order is
13 attached as Exhibit A. CFA also requests that the State Board review
14 Regional Board Order No. R1-2004-0016, Categorical Waiver of Waste
15 Discharge Requirements for Discharges Related to Timber Harvest
16 Activities on Non-federal Lands in the North Coast Region (the
17 "Categorical Waiver"). A copy of the Categorical Waiver is attached as
18 Exhibit B.

19 3. The Regional Board adopted Order Nos. R1-2004-0030 and
20 R1-2004-0016 on June 23, 2004.

21 4. As set forth more fully in the statement of points and
22 authorities contained in this Petition for Review and Request for Hearing
23 ("Petition"), the Regional Board's actions are arbitrary, capricious and in
24 violation of law and policy. CFA seeks State Board review relating to the
25 following issues:

- 26 • The General WDRs improperly expand the scope of the
27 regulation of non-federal timberland owners by
28 expanding the scope of activities regulated as
"discharges of waste" in violation of the Porter-Cologne
Water Quality Control Act;

- 1 • The General WDRs improperly regulate all discharges
2 without proper consideration of the actual or potential
3 effect of the discharge on water quality or existing
4 standards contained in the Water Quality Control Plan for
5 the North Coast Region (“Basin Plan”); and
- 6 • The General WDRs arbitrarily and capriciously dictate
7 the means of compliance, impose an unnecessary and
8 unjustified regulatory burden and otherwise violate the
9 standards for establishing waste discharge requirements.
- 10 • The General WDRs and the Categorical Waiver
11 arbitrarily and capriciously dictate eligibility criteria that
12 are so vague and uncertain as to generate confusion
13 rather than clarity regarding what timber harvesting
14 operations are covered.
- 15 • The Categorical Waiver improperly limits eligible THPs,
16 excluding from waiver coverage even those plans where
17 the plan submitter agrees to all Regional Board staff’s
18 recommendations during the THP review process.

19 5. CFA is a non-profit trade association whose members include
20 forest landowners, professional resource managers, and producers of wood
21 products and biomass energy throughout the State of California. Several
22 CFA members, including Green Diamond Resource Company, Campbell
23 Timberland Management LLC, and the Pacific Lumber Company, among
24 others, operate within the Regional Board’s jurisdiction. CFA and its
25 members participated in the public review of the General WDRs and the
26 Categorical Waiver. For example, CFA filed written comments on the
27 tentative order with the Regional Board relating to the General WDRs on
28 June 4, 2004 and written comments on the tentative order relating to the

1 Categorical Waiver on May 28, 2004.

2 6. CFA is aggrieved by the Regional Board's actions because its
3 members will be subjected to unlawful and objectionable provisions, which
4 are arbitrary and capricious, unsupported by evidence in the record and
5 exceed the Regional Board's authority. As a result, CFA members face
6 unnecessarily strict restrictions on their forestry activities, increased
7 overall costs of compliance and other serious economic consequences.

8 7. For the reasons discussed more fully in the statement of points
9 and authorities, which commences below, CFA requests that the State Board
10 amend the General WDRs to accomplish the following: a) limit the General
11 WDRs' application to "discharges of waste" as legally defined, and to
12 exclude existing conditions in the watershed that are not "discharges" and
13 do not result from a "discharge"; b) comply with the Porter-Cologne Act
14 standards for establishing waste discharge requirements; and c) comply with
15 the Porter-Cologne Act and Basin Plan requirements to consider the effect
16 of a discharge on water quality in determining the extent and type of
17 regulation. Further, CFA requests that the State Board amend the
18 Categorical Waiver to expand its overly-narrow scope and strike vague and
19 uncertain eligibility criteria. As an alternative to the State Board's
20 amending the General WDRs and the Categorical Waiver, CFA requests that
21 the State Board remand these matters to the Regional Board with
22 instructions to revise the General WDRs and/or the Categorical Waiver
23 consistent with these points. For purposes of the State Board's review, CFA
24 considers the evidence identified in Section V of the points and authorities
25 below already to be part of the record relating to the General WDRs and the
26 Conditional Waiver. However, for ease of reference and clarity, CFA
27 requests that these documents formally be incorporated into the record for
28 the General WDRs and the Categorical Waiver. Alternatively, to the extent

1 that the State Board may wish to consider this as "additional" evidence, our
2 arguments for its inclusion are also presented in Section V of the points and
3 authorities.

4 8. It is CFA's hope that the issues raised in this Petition may be
5 resolved through further discussions with the Regional Board and its staff.
6 Accordingly, pursuant to 23 Cal. Code Regs. section 2050.5(d), CFA
7 requests that the State Board hold this Petition in abeyance pending such
8 discussions. By copy of this Petition to the Regional Board, CFA hereby
9 notifies the Regional Board of its request to hold the Petition in abeyance.
10 In the event that it becomes necessary to pursue this Petition following the
11 outcome of such discussions, CFA shall request that the Petition be
12 removed from abeyance. In that event, CFA requests a hearing in this
13 matter and reserves the right to request an opportunity to present additional
14 evidence and analysis of these issues that might come to light or otherwise
15 become pertinent as a result of those discussions.

16 9. The State Board's regulations require submission of a
17 memorandum of points and authorities in support of the legal issues raised
18 in a petition. 23 Cal. Code Regs. § 2050(a)(7). However, because the
19 complete administrative record in this matter is not yet available, it is not
20 possible to prepare a thorough memorandum. Therefore, CFA's statement
21 of points and authorities in support of its position on the issues raised in
22 this Petition, which commences below, is intended to serve as a preliminary
23 memorandum, and CFA reserves the right to supplement this memorandum
24 when the administrative record and other materials become available.

25 10. A copy of this Petition is being sent by first-class mail to the
26 Regional Board on July 23, 2004, to the attention of Catherine Kuhlman,
27 Executive Officer.

28 11. The substantive issues and objections raised in this Petition

1 were raised before the Regional Board.

2

3 **STATEMENT OF POINTS AND AUTHORITIES**

4 I. BACKGROUND.

5 In adopting the General WDRs, it was necessary for the Regional
6 Board to address many significant issues that remain outstanding as a result
7 of the unresolved appeal of the 2002 and 2003 interim Conditional Waivers
8 of Waste Discharge Requirements for Timber Harvest Activities (the
9 “Interim Waivers”).¹ CFA continues to hold its views advanced in the
10 consolidated appeals² that the regulatory approach reflected in the Interim
11 Waivers is legally adequate and not only appropriate, but preferable to
12 other regulatory mechanisms. Nevertheless, CFA and its members have
13 participated extensively in the Regional Board’s efforts to develop the
14 General WDRs as an alternative to use of a waiver of waste discharge
15 requirements. Despite a valiant effort on the part of the Regional Board
16 and interested parties, significant issues remain, and the General WDRs as
17 adopted do not adequately address CFA’s concerns raised during the
18 Regional Board’s review of the proposed General WDRs and Categorical
19 Waiver. Accordingly, CFA petitions the State Board for review of the
20 General WDRs and the Categorical Waiver. However, CFA requests that
21 the State Board hold CFA’s petition in abeyance pending further
22 discussions with the Regional Board on the issues raised in this appeal.

23 ¹ North Coast RWQCB Resolution Nos. R1-2002-0109, R1-2003-0116;
24 SWRCB/OCC File A 1539. RWQCB Resolution No. R1-2003-0116 is attached as
Exhibit C.

25 ² The State Board consolidated its review of the Interim Waivers with its
26 review of conditional waivers adopted by the Lahontan Regional Water Quality
27 Control Board (Resolution No. R6T-2003-0001, SWRCB/OCC File A 1546) and
28 the Central Valley Regional Water Quality Control Board (Resolution No. R5-
2003-0005, SWRCB/OCC File Nos. A-1552 and A-1552(a)). The State Board
subsequently approved orders relating to the Lahontan (WQO 2004-0001) and
Central Valley (WQO 2004-002) conditional waivers.

1 Pursuant to the Porter-Cologne Water Quality Control Act (Water
2 Code §13000, *et seq.*, the “Porter-Cologne Act”), persons discharging waste
3 or proposing to discharge waste that could affect the quality of California’s
4 waters must file a report of waste discharge with the appropriate regional
5 board. Water Code § 13260(a). Based on the report, the Regional Board
6 may either impose waste discharge requirements (“WDRs”) limiting
7 discharges in accordance with the conditions existing in the receiving
8 waters [Water Code § 13263(a)³] or grant a conditional waiver of such
9 requirements if certain conditions are met. Water Code § 13269.

10 WDRs may be issued for individual discharges or general categories
11 of discharges. Water Code § 13263. Regional boards or the State Board are
12 authorized to prescribe general waste discharge requirements for a category
13 of discharges that are produced by the same or similar operations, involve
14 the same or similar types of waste, require the same or similar treatment
15 standards, and are “more appropriately regulated under general discharge
16 requirements than individual discharge requirements.” Water Code
17 § 13263(i).

18 The Regional Board adopted the subject General WDRs in this case
19 on June 23, 2004, and thereby established general waste discharge
20 requirements as well as a limited categorical waiver. General WDRs
21 Recital 17. However, the General WDRs raise significant questions of law
22 and policy. For example, for the reasons discussed below, the General

23 ³ Water Code § 13263(a) provides as follows: “The regional board, after
24 any necessary hearing, shall prescribe requirements as to the nature of any
25 proposed discharge, existing discharge, or material change in an existing
26 discharge, except discharges into a community sewer system, with relation to the
27 conditions existing in the disposal area or receiving waters upon, or into which,
28 the discharge is made or proposed. The requirements shall implement any
relevant water quality control plans that have been adopted, and shall take into
consideration the beneficial uses to be protected, the water quality objectives
reasonably required for that purpose, other waste discharges, the need to prevent
nuisance, and the provisions of Section 13241.”

1 WDRs improperly extend the scope of the regulation of non-federal
2 timberland owners by expanding the scope of activities regulated as
3 “discharges of waste” in violation of the Porter-Cologne Water Quality
4 Control Act; improperly regulates all discharges without proper
5 consideration of the actual or potential effect of the discharge on water
6 quality or existing standards contained in the Basin Plan; and arbitrarily
7 and capriciously dictates the means of compliance, imposes an unnecessary
8 and unjustified regulatory burden and otherwise violates the standards for
9 establishing waste discharge requirements. Adoption of the General WDRs
10 under these circumstances is inconsistent with applicable law, unsupported
11 by the evidence and would have grave policy implications and would ill-
12 serve the public interest. Among other things, CFA seeks review of both
13 the legal authority and the propriety of this Order.

14 In *California Hotel and Motel Association v. Industrial Welfare*
15 *Commission*, 25 Cal.3d 200, 212 (1979), the California Supreme Court held
16 that:

17 A court will uphold the agency action unless the
18 action is arbitrary, capricious, or lacking in
19 evidentiary support. A court must ensure that an
20 agency has adequately considered all relevant
factors, and has demonstrated a rational connection
between those factors, the choice made, and the
purposes of the enabling statute.

21 As set forth herein, CFA asserts that the Order, as adopted, does not meet
22 this standard and therefore must be modified.

23 II. THE GENERAL WDRs ARE INCONSISTENT WITH STATE LAW
24 AND POLICY REGARDING REGULATION OF ACTIONS
25 CONSTITUTING “DISCHARGE OF “WASTE.”

26 The Regional Board has authority to “prescribe requirements as to the
27 nature of any proposed *discharge*, existing *discharge*, or material change in
28

1 an existing *discharge*.” Water Code § 13263(a) (emphasis added).
2 However, the Regional Board’s action in adopting the General WDRs
3 exceeds this authority to the extent that this Order is directed at existing
4 conditions in the watershed that are not “discharges” and that do not result
5 from a “discharge.” The substantive provisions of the Order, which
6 expressly govern existing sediment conditions on the landscape, do not bear
7 out the statement of intention included in Recital 22 that “this order is
8 intended to apply to new discharges from timber harvest activities.” While
9 it is proper for the Regional Board to take account of existing water quality
10 conditions in establishing waste discharge requirements for current timber
11 harvest operations, general WDRs are not an appropriate mechanism to
12 impose requirements for correction of existing landscape conditions not
13 associated with current timber harvesting operations.

14 A. The General WDRs Improperly Regulate Sediment Runoff from
15 Existing Environmental Conditions as a “Discharge” of Waste.

16 The Order defines “controllable sediment discharge source” [General
17 WDRs § I(A)] to include “sites or locations, both *existing* and those created
18 by proposed timber harvest activities” (emphasis added). However, inputs
19 of sediment from existing landscape conditions, including legacy sediment
20 sources, are not “discharges” subject to the direct regulatory jurisdiction of
21 the Regional Board. Inconsistent with its authority, the Regional Board,
22 under the Order, expressly requires non-federal commercial timberland
23 owners to develop and implement an erosion control plan “to prevent and
24 minimize the discharge or threatened discharge of sediment from
25 controllable sediment discharge sources into waters of the state.” General
26 WDRs §§ III(C)(1)(a); III(D). In so doing, the Order improperly expands
27 the direct control of the Regional Board over existing conditions. In other
28 words, the General WDRs are not regulating discharges associated with

1 timber harvest activity but water quality impacts associated with passive
2 ownership of land, i.e., impacts due solely to activities of a previous
3 property owner or past activities under a prior regulatory regime.

4 In the absence of a definition of “discharge” in the Porter-Cologne
5 Act, courts have adopted a broad definition of the term. In *Lake Madrone*
6 *Water District v. State Water Resources Control Board*,⁴ the court held that
7 “discharge” should be given its plain, dictionary meaning: “to relieve of a
8 charge, load or burden;. . . to give outlet to: pour forth: emit” and
9 determined that “[a]ccording to this definition, the burden of sediment
10 emitted by the opening of the gate valve in Lake Madrone Dam is a
11 discharge.” *Id.* Nevertheless, active human agency – the opening of the
12 dam gate – was the predicate for imposing obligations for a “discharge.”
13 This distinction was raised in *Tahoe-Sierra Preservation Council, Inc. v.*
14 *Tahoe Regional Planning Agency*, 34 F. Supp. 2d 1226 (D. Nev. 1999),
15 affirmed in part, reversed in part on other grounds, 216 F.3d 764 (9th Cir.
16 2000)⁵; a case involving restrictions on development to address runoff of
17 sediment into Lake Tahoe. Construing the Porter-Cologne Act in the
18 context of determining whether that statute had modified California’s
19 common law of nuisance, the court concluded that:

20 *Lake Madrone*, which interpreted the Water Code
21 to include ‘concentrated silt or sediment’ as
22 ‘waste,’ involved sediment which was concentrated
23 by a dam to the point where, when released, silt up
24 to 18 inches deep was deposited in Berry Creek,
25 [citation omitted]. . . . The one act that was
26 enjoined was the releasing of water from the
bottom of the dam, where all the sediment was
collected. Thus the relationship between the
enjoined act and the damage was much more direct,
and the damage much more immediate. . . . In
Lake Madrone, the defendant did commit an act

27 ⁴ 209 Cal. App. 3d 163, 170 (1989).

28 ⁵ The petition for rehearing en banc was denied. 228 F.3d 1998 (9th Cir. 2000).

1 that could be construed as ‘disposing’ of wastes--
2 i.e., opening the gates in the dam and releasing the
 sediment-choked water into the stream.⁶

3 For existing legacy sites or other locations of passive sediment
4 discharge on the North Coast, no action is occurring comparable to the
5 opening of the dam gate in *Lake Madrone*, and landowners are not engaging
6 in any activity that otherwise can be construed as a “discharge” to
7 California waters. Therefore, the sediment running off from such sources
8 cannot properly be characterized as waste. Rather, CFA’s members simply
9 own land where conditions caused under prior regulatory regimes result in
10 runoff or threatened runoff of sediment that is affecting or could adversely
11 affect water quality. The passive ownership of land involves no affirmative
12 act that can properly be construed as a “discharge of waste.”

13 This is not an issue of first impression for the State Board. In 2001,
14 the State Board reviewed a Regional Board water quality monitoring and
15 reporting order that petitioners argued improperly regulated sediment runoff
16 from legacy sources as a discharge of waste. On this issue, the State Board
17 modified the order under review, limiting its scope to discharges from
18 current timber harvesting operations:

19 This order upholds the authority of the Regional
20 Board to issue water quality monitoring and
21 reporting orders, but revises the requirements of
22 Order No. R1-2001-19 based on our review of the
23 evidentiary record. In the absence of THP 520,
 neither the Regional Board’s order, nor the revised
 requirements established in this order, would apply
 to Pacific Lumber’s passive ownership of land.

24 State Water Resources Control Board Order WQ 2001-14, pp. 10-11,
25 attached as Exhibit D. Given the thousands of acres of land within the
26 Regional Board’s jurisdiction that contribute sediment to a watercourse

27 _____
28 ⁶ 34 F. Supp. 2d at 1254.

1 from legacy roads and other existing conditions (as opposed to discharges
2 of sediment actually caused by current timber harvesting activity), the
3 Order at issue in this appeal is inconsistent with State Board precedent and
4 has significant regulatory and policy implications.

5 There is no basis for characterizing sediment runoff from existing
6 conditions as a “discharge of waste.” For this reason, there is no basis to
7 regulate it as such under the General WDRs. The Regional Board’s
8 concerns regarding existing conditions on the North Coast do not, and
9 cannot, provide a legal basis to extend the Regional Board’s authority
10 beyond the limits of State law to reach regulation of existing conditions
11 under the Order. Therefore, CFA requests that the State Board revise, or
12 direct the Regional Board to revise on remand, the Order to limit its
13 application to “discharges” as legally defined, and not to include existing
14 conditions in the watershed.

15 As noted above, while it is proper for the Regional Board to take
16 account of existing water quality conditions in establishing waste discharge
17 requirements for current timber harvest operations, general WDRs are not
18 an appropriate mechanism to impose requirements for correction of existing
19 landscape conditions not associated with current timber harvesting
20 operations. As CFA has stated in other contexts before the State Board,
21 existing adverse conditions, including legacy sediment concerns, must be
22 remedied as part of any serious effort to improve water quality. However,
23 such concerns must be, and are being, addressed under California’s water
24 quality regime pursuant to the Total Maximum Daily Load (“TMDL”)
25 program. Clean Water Act § 303(d), 33 U.S.C. § 1313(d). This Order,
26 regarding control of nonpoint source discharges from current timber
27 operations, is not the appropriate mechanism to remedy existing conditions.
28 That is particularly true because the Order [General WDRs § V(A)(4)]

1 dictate that the applicability of the General WDRs will be rescinded or
2 denied:

3 where conditions unique to the watershed, or
4 watershed segment (including, but not limited to,
5 cumulative impacts, special hydrographic
6 characteristics, Total Maximum Daily Load
7 standards, the extent of timber harvest activities,
8 intensity of ground disturbing activities, large
acreage ownership holdings or management plans,
rain slopes, soil, effected domestic water supplies,
an increased risk of flooding, or proximity to local,
State, or National Parks) warrant further
regulation.

9 Thus, the General WDRs do not even apply to timber harvesting operations
10 in areas where adverse cumulative watershed conditions warrant a different
11 approach to address existing conditions.

12 B. The General WDRs Improperly Regulate Changes in Water
13 Temperature Associated With Harvest-Related Increases In Canopy
14 Openings as a “Discharge of Waste.”

15 The General WDRs specify that wastes “specifically regulated under
16 this Order include “heat.” Order § I(K). It appears that the Order and its
17 discharge prohibition [§ III(A)(1)] are intended to cover timber harvesting
18 activity that could raise water temperatures where no material associated
19 with timber harvesting activity enters or threatens to enter water. Water
20 Code section 13260(a) prescribes when a party must submit a report of
21 waste discharge and, subsequently, may be subjected to waste discharge
22 requirements. On this issue, the operative term present in every subsection
23 of section 13260(a) is “waste.” Water Code section 13050(d) defines
24 “waste” to include “sewage and all other waste substances, liquid, solid,
25 gaseous, or radioactive, associated with human habitation, or of human or
26 animal origin, or from producing, manufacturing or processing operation of
27 whatever nature, including waste placed within containers of whatever
28 nature prior to, and for purposes of, disposal.” By even the furthest stretch

1 of one's imagination, solar energy conveyed from the air to a waterbody as
2 a result of simple removal of trees in riparian areas that may open overstory
3 canopy closure and thereby increase air and water temperatures – without
4 actual movement of material into water – does not involve a “discharge” or
5 threatened discharge of anything, let alone a waste. Because there is no
6 “discharge” of waste in this context, “heat” is not properly regulated under
7 the Order.

8 III. THE GENERAL WDRS VIOLATE THE PORTER-COLOGNE ACT'S
9 STANDARDS FOR ESTABLISHING WASTE DISCHARGE
10 REQUIREMENTS.

11 The evidence before the Regional Board does not justify the
12 additional regulation imposed by replacing the 2003 Interim Waiver with
13 the General WDRs. Indeed, this General WDRs violate the requirements of
14 the Water Code to avoid unreasonably burdensome regulation and to
15 consider economic and technological feasibility and costs, as well as
16 environmental factors, in establishing waste discharge requirements. Water
17 Code section 13000 provides:

18 activities and factors which may affect the quality
19 of the waters of the state shall be regulated to
20 attain the highest water quality which is
21 reasonable, considering all demands being made
22 and to be made on those waters and the total values
23 involved, beneficial and detrimental, economic and
24 social, tangible and intangible.

22 Water Code section 13263 establishes the specific criteria for
23 establishing waste discharge requirements:

24 The requirements shall implement any relevant
25 water quality control plans that have been adopted,
26 and shall take into consideration the beneficial
27 uses to be protected, the water quality objectives
28 reasonably required for that purpose, other waste
discharges, the need to prevent nuisance, and the
provisions of Section 13241.

1 Among other things, section 13241 recognizes that “it may be
2 possible for the quality of water to be changed to some degree without
3 unreasonably affecting beneficial uses” and specifically requires
4 consideration of economics in establishing applicable requirements.

5 In order for the General WDRs to be upheld, their adoption and the
6 regulatory requirements they impose must be properly supported by
7 sufficient evidence in the administrative record. However, in the
8 consolidated Interim Waiver proceedings, insufficient factual evidence was
9 presented to substantiate that *current* forest practices under the *current*
10 Forest Practice Rules result in changes to water quality that unreasonably
11 affect beneficial uses. To the contrary, most applied field research reveals
12 that when properly implemented, today’s forest practices have minimal
13 adverse impact on water quality.⁷ Independent, third party sampling to
14 determine the effectiveness of *current* forest practices was conducted on
15 295 THPs and 5 non-industrial timber management plans (“NTMPs”).
16 Sixty-one percent of the plans sampled were located within the Coast Forest
17 Practice District. The Report concluded that:

18 [t]he frequency of erosion events related to current
19 operations in watercourse protection zones was
20 very low for Class I, II and III watercourses.
21 Similarly, landings and skid trails were not found
22 to be producing substantial impacts to water
23 quality. Erosion problems on landing surfaces, cut
24 slopes, and fill slopes were relatively rare.

25 Executive summary, p. v. CFA asserts that the record will not support the
26 adoption of the provisions of this Order and that it is arbitrary and
27 capricious in light of the evidence that was before the Regional Board.⁸

28 ⁷ See, for example, the report entitled *Hillslope Monitoring Program: Monitoring Results from 1996 through 2001* (“Report”), attached as Exhibit G.

⁸ See, e.g., Closing Brief filed by CFA in the Matter of the Coordinated Proceedings on Conditional Waivers of Waste Discharge Requirements for Timber Harvest Activities, relating to the Interim Waivers and the Lahontan Central
(continued...)

1 A. The General WDRs Dictate the Manner of Compliance in Violation of
2 the Porter-Cologne Act.

3 The Water Code contains a highly significant restriction on the
4 Regional Board's authority to regulate discharges directly, which is entirely
5 disregarded in the General WDRs. Where a regional board chooses to
6 regulate discharges directly, e.g., in conditions imposed in waivers or
7 through issuance of waste discharge requirements, the Regional Board
8 cannot dictate the manner of compliance in its regulation of discharges:

9 *no waste discharge requirement* or other order of a
10 regional board . . . shall specify the design,
11 location, type of construction, or particular manner
of compliance may be had with that requirement.

12 Water Code § 13360(a) (emphasis added).

13 For this reason, the *Plan for California's Nonpoint Source Pollution*
14 *Control Program* (the "NPS Program Plan"),⁹ which expressly applies to
15 discharges from timber harvest operations, focuses on the use of best
16 management practices ("BMPs") implemented and enforced directly by
17 another agency through a Management Agency Agreement ("MAA"). BMPs
18 developed and approved by the Board of Forestry and implemented in the
19 THP process can and do dictate the manner of compliance — in the form of
20 regulations incorporated in Forest Practice Rules (14 Cal. Code Regs. § 895
21 *et seq.*). Accordingly, while regional boards may utilize the authorities of
22 other agencies to implement and enforce specific BMPs through the
23 execution of MAAs (NPS Program Plan at 55-56), the Regional Board may
24 not dictate the manner of compliance as conditions of the General WDRs.

25 (...continued)

Valley categorical waivers.

26 ⁹ See generally, State Water Resources Control Board, Nonpoint Source
27 Pollution Control Program, *Plan for California's Nonpoint Source Pollution*
28 *Control Program (NPS Program Plan)* (rev. July 20, 2004)
<<http://www.swrcb.ca.gov/nps/protecting.html>>.

1 The requirements for an erosion control plan [General WDRs § I(C)]
2 reflect a clear violation of this requirement. For example, under the Order,
3 the erosion control plan [General WDRs § I(C)] “shall incorporate Regional
4 Water Board staff recommendations generated as part of the Project review
5 and approval process that were designed to prevent and minimize discharge
6 of sediment.” Further, the Discharger “shall incorporate” the technical
7 reports, including the erosion control plan and fuel management plan, “into
8 the Project as a separate section(s) or submit them with their application
9 when seeking coverage under these General WDRs.” Order § III(C)(1).
10 This leaves non-federal timberland owners without any substantive choice
11 at all – they must accept all Regional Board recommendations, without
12 exception, either during the THP review process or pursuant to the General
13 WDRs. Noncompliance with any imposed “recommendation” in either case
14 could result in serious consequences for the landowner. See, e.g., Forest
15 Practice Act art. 8 (Pub. Res. Code § 4601 et seq.); General WDRs
16 § IV(H)..

17 B. The General WDRs Are Inconsistent with the Characteristics of a
18 “General Permit” and Exceed the Porter-Cologne Act’s Mandate for
19 Reasonable Protection of Water Quality.

20 The General WDRs have a number of characteristics that make them
21 unnecessarily burdensome and inefficient in their application.

22 1. The Order essentially establishes General WDRs in name only; the
23 procedural characteristics of a General Permit are lacking.

24 As part of its obligation to develop and implement a reasonable
25 regulatory approach that adequately protects water quality, the Regional
26 Board is directed to consider the imposition of general waste discharge
27 requirements, rather than imposing individual WDRs for each discharge.
28 Water Code section 13263 sets forth the criteria for utilizing a general

1 WDR approach:

- 2 (1) The discharges are produced by the same or
3 similar operations.
- 4 (2) The discharges involve the same or similar
5 types of waste.
- 6 (3) The discharges require the same or similar
7 treatment standards.
- 8 (4) The discharges are more appropriately
9 regulated under general discharge
10 requirements than individual discharge
11 requirements.

12 Adoption of general WDRs to regulate many similar discharges under one
13 permit provides a less-burdensome approach to the protection of water
14 quality than issuance of individual WDRs by, for example, “greatly
15 reduc[ing] the otherwise overwhelming administrative burden associated
16 with permitting individual storm water discharges.”¹⁰ In the present case,
17 the discharges covered by the General WDRs – with the exception of
18 sediment inputs from existing sources and increased water temperature,
19 which we previously rejected as a “waste discharge” – clearly qualify for
20 coverage under general discharge requirements. The intent of the Regional
21 Board, as reflected in its characterization of the Order as General WDRs
22 [Recital 17], is to impose general discharge requirements.

23 However, as reflected in a comparison to another general permit
24 scheme, the General Industrial Storm Water Permit,¹¹ the Order has few if
25 any of the characteristics of a General Permit. Here, the Regional Board
26 has not taken appropriate advantage of the general permit mechanism to

27 ¹⁰ See, e.g., State Water Resources Control Board, *Fact Sheet for Water
28 Quality Order 99-08-DWQ* (NPDES General Permit for Storm Water Discharges
Associated with Construction Activity)
<<http://www.swrcb.ca.gov/stormwtr/docs/finalconstpermit.pdf>> p. 2.

¹¹ Regarding the Industrial General Permit and related forms, see State Water
Resources Control Board, Storm Water Program (rev. March 24, 2004)
<http://www.swrcb.ca.gov/stormwtr/gen_indus.html>.

1 regulate water quality in a way that reasonably relates the benefits and
2 burdens. Indeed, in spite of having elected to adopt a general permit, the
3 Regional Board missed an opportunity to “greatly reduce the otherwise
4 overwhelming administrative burden” of issuing individual WDRs by
5 imposing duplicative, unnecessary and burdensome conditions, regardless of
6 existing mechanisms that achieve the goals of appropriately protecting
7 North Coast waters. In so doing, the General WDRs violate the Water Code
8 mandate to impose a reasonable regulatory approach that adequately
9 protects water quality.

10 For example, in the case of the General Storm Water Permit, there is
11 no express approval of individual discharges. Rather, the General Storm
12 Water Permit specifies that the discharger seeking coverage must

- 13 • File a Notice of Intent to be covered by the general permit
- 14 • Prepare, retain onsite, and implement a Storm Water Pollution
15 Prevention Plan (“SWPPP”) that meets the criteria of the
16 general permit and selects and implements BMPs for the
17 facility
- 18 • Comply with all the requirements of the general permit
19 provisions and applicable regulations, including ensuring that
20 discharges covered by the permit do not cause or contribute to
21 a violation of an applicable water quality standard¹²
- 22 • Develop and implement a monitoring program to demonstrate
23 compliance with the general permit, aid in SWPPP
24 implementation and evaluate effectiveness of BMPs in reducing
25 or preventing pollutants in storm water discharges.

26 ¹² Regarding the range of issues to be considered in preparing a SWPPP, see,
27 for example, State Water Resources Control Board, *Checklist to Assist with*
28 *Preparation of the SWPPP* (July 6, 2004)
http://www.swrcb.ca.gov/stormwtr/docs/const_swppp.pdf>.

1 Coverage under the General Storm Water Permit commences concurrently
2 with the submittal of the Notice of Intent, rather than waiting for an
3 affirmative approval from the Regional Board.

4 In contrast, the Order establishes a process for obtaining what are, in
5 effect, individual WDRs for individual Timber Harvesting Plans (“THPs”)
6 and, worse, delays commencement of activities under the Order until the
7 THP is approved by the California Department of Forestry and Fire
8 Protection (“CDF”). Under the Order, dischargers must submit an entire
9 application, rather than simply a NOI, that consists of a letter, an approved
10 project document, technical reports and a fee. General WDRs § II(B)(2).
11 The applicant then must wait until it “has received written notification from
12 the Executive Officer or the Regional Board stating that coverage under
13 these General WDRs is appropriate, or at least 90 days have passed since
14 CDF’s approval and there is no threat of pollution or nuisance.” General
15 WDRs § II(B)(2). In other words, each THP requires an individual
16 affirmative approval before coverage is available and the project may
17 proceed. Ironically, during discussions about the proposed General WDRs,
18 it was recognized that the circumstances involved with discharges from
19 timber harvest operations are very similar to those associated with other
20 types of storm water. As demonstrated by the General Industrial Storm
21 Water Permit, other less-burdensome approaches are clearly available and
22 are acceptable mechanisms for protecting water quality from storm water
23 discharges. In such circumstances, it was arbitrary and unreasonable for the
24 Regional Board to regulate discharges on a THP-by-THP basis.

25 Moreover, by requiring incorporation of Regional Board
26 recommendations by one mechanism (as part of a THP) or another (as a
27 condition of the General WDRs), the Regional Board improperly bypasses
28

1 the existing THP system¹³ and, in so doing, fails in its responsibility to
2 protect water quality using a reasonable approach. In the non-federal
3 timberland context, each THP is already subject to compliance with
4 programmatically-applied BMPs as well as site-specifically-selected BMPs
5 identified through the interdisciplinary review team process.¹⁴ Ninety-nine
6 percent of THPs are pre-screened by the Regional Board staff, which
7 calibrates its level of participation in the interdisciplinary review process
8 based on threat to water quality. Regional Board staff has reported that
9 their recommendations are accepted nearly all the time, and that the
10 acceptance rate will improve further still as a result of recent legislation.¹⁵
11 With such a system in place, it is arbitrary and unreasonable for the
12 Regional Board to require a separate formal approval of the proposed
13 discharge and accompanying erosion control plan and other elements of the
14 General WDRs as a condition of coverage. This process is not only
15 unnecessary and inefficient in light of the existing THP review process, but
16 the process set forth in the Order unnecessarily undermines the Board of
17 Forestry's statutory responsibility for the regulation of forestry operations.

18 2. THPs could and likely will be delayed for the full 90 day period
19 following THP approval.

20 If the Regional Board had adopted true general WDRs, then Regional

21 _____
22 ¹³ See comments of Mark S. Rentz, on behalf of CFA, to the Regional Board
on Proposed Order No. R1-2004-0030 (June 4, 2004), p. 1-2 regarding existing
regulatory mechanisms.

23 ¹⁴ The THP review team process evaluates "the potential environmental
24 impacts of timber operations," including potential water quality impacts. 14 Cal.
Code Regs. § 1037.5. This process incorporates the requirement for compliance
25 with the applicable basin plan and provides for regional board input on individual
THPs under consideration for approval by CDF.

26 ¹⁵ See, e.g., comments of Mark S. Rentz, on behalf of CFA, to the Regional
Board on Proposed Order No. R1-2004-0030 (June 4, 2004), p. 2: "As your own
27 staff has previously acknowledged, the vast majority (more than 85%) of
additional mitigation measures they request are incorporated into the final
28 approved THP."

1 Board review of the associated erosion control plan would take place
2 concurrently with the Department of Forestry's review of the THP (with
3 Regional Board participation) pursuant to the interdisciplinary review team
4 process. The THP review process (14 Cal. Code Regs. § 1037.4)¹⁶ provides
5 the Regional Board with a full opportunity to review the THP and
6 accompanying erosion control plan and notify the THP submitter of any
7 inconsistencies with the requirements of the General WDRs; this mechanism
8 provides an "exception" process in which the Regional Board could identify
9 and eliminate any noncompliant THPs from coverage under the General
10 WDRs. Thus, this process provides an additional mechanism for ensuring
11 compliance with the terms of the General WDRs that is not available to the
12 Regional Board in implementing and enforcing even the General Industrial
13 Storm Water Permit—because that permit does is not necessarily associated
14 with a separate permitting process like that for THPs. Following such a
15 process would not only ensure that all THPs that present serious water
16 quality issues would be denied coverage but also would allow those THPs
17 that do comply to proceed without additional and unnecessary delay.

18 As the General WDRs currently are written, operations on non-federal
19 commercial timberlands could be delayed, without a water-quality
20 justification, for 90 additional days simply because the process incorporated
21 in the Order allows it. Delays particularly concern CFA members because
22 they can significantly increase costs and, in some cases, interrupt the flow
23 of operations.¹⁷

24 Currently, it takes approximately two months to
25 prepare a THP and another three to four months of

26 ¹⁶ In practice, following submittal of the average THP, the approval
processing time exceeds 70 days. Comments of Peter F. Ribar, on behalf of
Campbell Timberland Management, to the Regional Board (June 4, 2004), p. 2.

27 ¹⁷ See comments of Mark S. Rentz, on behalf of CFA, to the Regional Board
on Proposed Order No. R1-2004-0030 (June 4, 2004), p. 4.

1 process time for approval. Adding anything more
2 than another ten working days to this already
3 cumbersome, lengthy and expensive process is
4 putting our business at risk.¹⁸

5 Where there is a more timely way to protect water quality, it is arbitrary,
6 capricious and unreasonable for the Regional Board provide for additional
7 delays.

8 3. The General WDRs remove Regional Board incentive to participate
9 actively in the THP process as an efficient means of protecting water
10 quality.

11 Under the system reflected in the Order, the Regional Board may
12 permissibly avoid active participation and make separate – and even
13 inconsistent – demands in the water quality approval process. Such a
14 process is inconsistent with the Porter-Cologne Act responsibilities
15 described above as well as with the Regional Board’s role in the THP
16 review team process. For example, each THP review team “when possible,
17 shall include a representative” from the appropriate regional board to assist
18 other review team members and the review team chairperson “evaluate the
19 potential environmental impacts of timber operations.” 14 Cal. Code Regs.
20 § 1037.5. The benefits of collaborative participation in the THP
21 environmental review process would be lost through the Regional Board’s
22 ability, under the Order, to mandate implementation of every
23 recommendation.

24 As noted above, the General WDRs require design and
25 implementation of an erosion control plan that “shall incorporate Regional
26 Water Board staff recommendations generated as part of the Project review

27 ¹⁸ Comments of Mr. Bernie Bush, on behalf of Green Diamond Resource
28 Company, to the Regional Board on the Draft General Waste Discharge
Requirements (WDRs) for Discharges Relating to Timber Harvest Activities on
Non-federal Lands in the North Coast (June 3, 2004), p. 2.

1 and approval process that were designed to prevent and minimize discharge
2 of sediment.” General WDRs § I(C). Rather than encouraging the Regional
3 Board to participate in the existing nonpoint source pollution control
4 structure to address discharges relating to timber harvesting activities, the
5 Order provides an affirmative disincentive to participate in the existing
6 process by establishing an independent mechanism to mandate incorporation
7 of Regional Board recommendations. Considering that a less-burdensome
8 alternative exists – using the existing governing structure, which includes
9 Regional Board authority to veto any timber harvesting plan approval if it
10 determines that the THP would violate the Basin Plan (Pub. Res. Code
11 § 4582.71) and evidence from Regional Board staff that that approximately
12 90 percent of its input is accepted during the THP process – the Regional
13 Board acted arbitrarily and capriciously when it adopted the Order.

14 C. The General WDRs Violate the Porter-Cologne Act and the Basin
15 Plan By Imposing Significant Regulatory Requirements to Control All
16 Covered Discharges Without Adequate Consideration of the Effect of
17 The Discharge on Water Quality.

18 As discussed above, WDRs are to be fashioned, among other things,
19 to implement the relevant basin plan and to consider the beneficial uses to
20 be protected and the water quality objectives reasonably required to protect
21 those beneficial uses. Water Code § 13263(a). The Basin Plan identifies
22 beneficial uses in section 2, water quality objectives in section 3 and an
23 *Action Plan for Logging, Construction and Associated Activities*, including
24 discharge prohibitions, in section 4 (p. 4-32). Specifically, the Basin Plan
25 prohibits discharges of sediment and other materials associated with
26 logging “in quantities deleterious to fish, wildlife, or other beneficial uses.”
27 As the Regional Board correctly notes in Recital 19 of the Order,
28 “Compliance with applicable water quality objectives, prohibitions, and

1 policies will protect the beneficial uses.” There is no need, and indeed no
2 legal basis, to exceed the authorized scope of regulation.

3 Nevertheless, Sections III(A)(1) and (5) of the General WDRs expand
4 upon this prohibition, authorizing covered discharges only where they both
5 (i) do not cause or contribute to a violation or exceedance of applicable
6 water quality requirements and (ii) are controlled through implementation
7 of measures for prevention and minimization.¹⁹ Instead of requiring control
8 measures only when an exceedance occurs, the two conditions are
9 independent of one another. Thus, the Order requires implementation of
10 controls for all covered discharges even if such discharges do not, in fact,
11 cause or contribute to any exceedance or are in amounts deleterious to fish,
12 wildlife and other beneficial uses. The General WDRs do not recognize the
13 possibility that control may not be necessary to ensure compliance with
14 applicable requirements. This provision places an additional regulatory
15 burden on landowners subject to the General WDRs that is not necessary to
16 meet the Basin Plan requirements.

17 D. Existing Statutory, Regulatory and Other Available Tools
18 Appropriately Protect Water Quality Associated with Current
19 Nonpoint Source Discharges from Non-federal Timber Operations,
20 and Should Continue to Be Utilized.

21 The existing State structure governing water quality and nonpoint
22 source discharges relating to timber operations includes the NPS Program
23 Plan, a Management Agency Agreement (“MAA”) supplemented by a

24 _____
25 ¹⁹ Under Section III(A)(1), “[d]ischarges of waste, which are not otherwise
26 authorized by [WDRs] issued by this Regional Board or the [State Board], to
27 waters of the state are prohibited, except as allowed in section III.A.5.” Under
28 Section III(A)5, “[d]ischarges are authorized only where they do not cause or
contribute to a violation or exceedance of applicable water quality requirements
and are controlled through implementation of appropriate project design and
management measures for prevention and minimization of waste discharges.”

1 Memorandum of Understanding (“MOU”) in 2003 among the State Board,
2 the California Board of Forestry and Fire Protection (“Board of Forestry”)
3 and the California Department of Forestry and Fire Protection (“CDF”);
4 programmatically-applied best management practices; site-specific review
5 pursuant to an interdisciplinary review team²⁰ process; and, in nearly all
6 cases, project-specific review specifically by Regional Board staff.
7 Evidence shows that this existing structure appropriately protects water
8 quality associated with current nonpoint source discharges from non-federal
9 timber operations. Therefore, the Regional Board acted arbitrarily and
10 capriciously when it adopted the General WDRs replacing the 2003 Interim
11 with the General WDRs’ unnecessary and overly-burdensome conditions.

12 E. Costs Associated with Implementing the General WDRs Do Not Bear
13 a Reasonable Relationship to the Intended Water Quality Benefits.

14 Particularly because there is an existing system in place that
15 appropriately protects water quality from the effects of nonpoint source
16 discharges from timber operations, the costs of complying with the
17 conditions of the General WDRs far exceed reason. The estimated costs of
18 compliance among CFA members vary, among other factors, in relation to
19 the acreage contemplated by each timberland owner’s plans – for plans that
20 include more acres, the cost of complying with the Order will be higher
21 than for plans that include fewer acres. Costs associated with compliance
22 with the General WDRs also may vary depending on the number of plans
23 submitted, and their timing and relative complexity.²¹ At the time
24 comments were due to the Regional Board on June 4, 2004, one CFA

25 _____
26 ²⁰ Review team members include the Regional Boards, CDF, the Department
of Fish & Game, the Department of Conservation, Division of Mines & Geology
and other resource agencies.

27 ²¹ Comments of Peter F. Ribar, on behalf of Campbell Timberland
28 Management, to the Regional Board (June 4, 2004), p. 3.

1 member estimated that costs of compliance with the erosion control plan
2 requirement alone represented a 64 percent increase in their THP costs
3 relative to the current process.²² Another landowner's worst-case estimate
4 of costs associated with compliance with the Order ranged between \$27,000
5 and \$31,000.²³ At that time, estimated additional costs were believed likely
6 to exceed \$25,000 for each THP as a result of having to comply with the
7 Order.²⁴ More recent information indicates that additional costs may be
8 lower. However, CFA and its members remain concerned that additional
9 unknown costs may be realized as implementation of the General WDRs
10 proceeds. Given that there is no evidence that the General WDRs would
11 provide any additional environmental benefit over the 2003 Interim Waiver,
12 any additional costs associated with implementing the General WDRs must
13 bear a reasonable relationship to the water quality benefits to be achieved in
14 excess of the benefits already provided pursuant to the existing regulatory
15 structure. Accordingly, the Regional Board acted arbitrarily and
16 capriciously when it adopted the General WDRs.

17 IV. THE CATEGORICAL WAIVER IS ARBITRARY AND CAPRICIOUS.

18 The Categorical Waiver contains such a limited scope of
19 qualifications that the vast majority of THPs for industrial timber
20 operations cannot qualify. There is no factual evidence that a failure to
21 comply with these conditions will *carte blanche* result in significant
22 adverse impacts to water quality and beneficial uses. Furthermore, the
23 Categorical Waiver fails to incorporate those plans where the plan submitter

24 ²² See Mike Tadlock, *Assessment of Costs Associated with Development and*
25 *Implementation of Erosion Control Plans* submitted with the comments of
Peter F. Ribar, on behalf of Campbell Timberland Management, to the Regional
Board (June 4, 2004).

26 ²³ See comments of Mr. Bernie Bush, on behalf of Green Diamond Resource
Company (June 3, 2004), page 2.

27 ²⁴ See, e.g., comments of Mark S. Rentz, on behalf of CFA, to the Regional
28 Board on Proposed Order No. R1 2004 0030 (June 4, 2004), p. 3.

1 agrees to all Regional Board staff's recommendations for additional
2 mitigation measures brought forth during the THP review process. Surely,
3 these plans would in no way violate the Basin Plan and, therefore, should
4 qualify for the Categorical Waiver. As such, it is a waiver in name only,
5 and is designed to funnel such THPs into the flawed General WDRs process
6 discussed above.

7 In addition to this general objection, the Categorical Waiver contains
8 eligibility criteria that are so vague and uncertain as to be arbitrary and
9 capricious. In particular, the Categorical Waiver's limitation of coverage to
10 THPs that were not the subject of a non-concurrence filed "which was not
11 resolved" prior to its approval by CDF²⁵ is fraught with interpretive and
12 administrative difficulties and uncertainties. The Categorical Waiver is
13 susceptible to the interpretation that THPs approved by CDF prior to
14 June 23, 2004, but with respect to which the Regional Board submitted a
15 non-concurrence, no longer are covered by the 2003 Interim Waiver. This
16 would present grave legal and policy concerns in and of itself. Such
17 concerns are only exacerbated by the Categorical Waiver's apparent
18 provision that THPs filed as of June 23, 2004, but not yet approved by CDF,
19 will enjoy the coverage of the 2003 Interim Waiver so long as they are
20 approved by October 15, 2004, and qualify for coverage under the terms and
21 conditions of the 2003 Interim Waiver. The 2003 Interim Waiver did not
22 contain the Categorical Waiver's eligibility limitation concerning non-
23 concurrences. This inconsistent treatment of THPs is arbitrary and
24 capricious. Therefore, CFA requests that this eligibility criterion be
25 stricken from the Categorical Waiver.

26
27 ²⁵ See, e.g., Categorical Waiver Section IV: Waiver Of Reports Of Waste
28 Discharge And Waste Discharge Requirements For Projects Previously Waived
Under Order No. R1-2003-0116.

1 V. EVIDENTIARY MATTERS.

2 For the reasons indicated, CFA considers the evidence identified
3 below – and attached to this Petition as indicated – already to be part of the
4 record relating to the General WDRs and the Conditional Waiver and, based
5 on statements of the Regional Board, that it was not necessary to duplicate
6 it in the Regional Board records for the General WDRs and Categorical
7 Waiver. See, for example, the Regional Board’s *Response to Comments:*
8 *General Waste Discharge Requirements for Discharges Related to Timber*
9 *Harvest Activities on Non-federal Lands in the North Coast Region, Order*
10 *No. R1-2004-0030*, p. 4:

11 In 2000, 2001, 2002, 2003 and 2004, various
12 petitions were filed with the Regional and State
13 water boards, seeking a higher level of
14 involvement by the boards in protecting water
15 quality, based on concerns that the THP process
16 alone was not resulting in the full protection of
17 beneficial uses and compliance with Porter-
18 Cologne standards. These petitions, along with
19 legislation requiring a re-visiting of prior waivers
20 of WDRs for timber operations, resulted in two
21 specific State Board orders, noting that existing
22 implementation of the THP process alone was
23 insufficient in regards to a specific major timber
24 operator (see State Board WQOs # 2001-14, #
25 2002-004, and # 2002-0019) and a pending State
26 Board Order (see State Board petition OCC # A-
1539, draft order available at:
<http://www.swrcb.ca.gov/agendas/2004/january/0107-08.doc>) to adopt a regulatory scheme that is
more protective of water quality than the existing
Interim Waiver of WDRs. The proposed General
Waste Discharge Requirements, the accompanying
Categorical Waiver of Waste Discharge
Requirements (for a specified sub-set of low-
impact operations), watershed-wide Waste
Discharge Requirements for some of the more
problematic watersheds, and the ongoing
development of TMDLs, are all part of the
Regional Board’s cumulative response to the
above-described concerns and issues.

27 CFA and its members have relied on the Regional Board's incorporation by
28 reference of these prior record materials, as indicated in its “cumulative

1 response” on the General WDRs and Categorical Waiver.

2 CFA considers the evidence attached to this Petition already to be
3 part of the record relating to the General WDRs and the Conditional
4 Waiver. However, for ease of reference and clarity, we are including it
5 again. These studies, reports, testamentary evidence and other information
6 relate to issues common to the Order, Categorical Waiver and Interim
7 Waivers that precede them in the ongoing effort to address nonpoint source
8 discharges associated with timber operations on the North Coast. Such
9 issues relate, for example, to the current system regulating such discharges
10 - including the Regional Board’s participation in and efficacy of the current
11 system; and the existing condition of North Coast waters. The Regional
12 Board, like the State Board, is familiar with these documents, has them in
13 its files, use them regularly and has considered them as part of the context
14 and milieu for the actions now at issue. Specifically, CFA incorporates by
15 reference, and again provides, the following documents:

16 Exhibit E: Written testimony of Carlton S. Yee, PhD, RPF

17 Exhibit F: Yee, C., *California’s Forest Practices and*
18 *Environmental Quality* (April 2003).

19 Exhibit G: Monitoring Study Group, *Hillslope Monitoring Program*
20 *Monitoring Results from 1996 through 2001* (Dec. 2002).

21 Exhibit H: Tuttle, A.E., *Memorandum of Understanding*
22 (March 2003).

23 Exhibit I: Bawcom, J.A., *Clearcutting and Slope Stability:*
24 *Preliminary Findings on Jackson demonstration State*
25 *Forest, Mendocino County, California.*

26 Exhibit J: Fuller, M. and Custis, K., *Report on the Geologic and*
27 *Geomorphic Characteristics of the Gualala River*
28 *Watershed, California* (Dec. 2002).

- 1 Exhibit K: Davenport, C.W., Thornburg, K. and Haydon, W.D.,
2 *Report on the Geologic and Geomorphic Characteristics*
3 *of the Mattole River Watershed, California* (Nov. 2002).
- 4 Exhibit L: Falls, J.N., McGuire, D.J., and Dell’Osso, D.R., *Report*
5 *on the Geologic and Fluvial Geomorphic Characteristics*
6 *of the Redwood Creek Watershed, California* (June 2003).
- 7 Exhibit M: Written testimony of Peter F. Ribar, RPF
- 8 Exhibit N: North Coast Board, Executive Officer’s Summary Report
9 regarding Consideration of a Sensitive Watershed
10 Nomination to the California Board of Forestry and Fire
11 Protection for the Elk River Watershed Pursuant to
12 Section 916.8 of the Forest Practice Rules (June 18,
13 2003).
- 14 Exhibit O: North Coast Board, Resolution No. R1 2003 0076,
15 Forwarding the Elk River Sensitive Watershed
16 Nomination to the California Department of Forestry and
17 Fire Protection (June 6, 2003).
- 18
- 19 Exhibit P: Comments of the California Department of Fish and
20 Game (Oct. 2, 2003).
- 21 Exhibit Q: Comments of the California Geologic Survey (Jan. 22,
22 2003).
- 23
- 24 Exhibit R: Dr. George Ice, P.H., C.F., R.P.F., A History of
25 Innovative BMP Development and its Role in Addressing
26 Water Quality Limited Waterbodies.
- 27 Exhibit S: Comments of Dr. George Ice, P.H., C.F., R.P.F. (Aug. 22,
28

1 2003).

2 Exhibit T: Transcript of the North Coast Board's November 5, 2003
3 Hearing.
4

5 Exhibit U: Comments of the California Department of Forestry and
6 Fire Protection (Sept. 23, 2003).

7 Exhibit V: Comments of Dr. Carlton S. Yee, R.P.F (Aug. 20, 2003).
8

9 Exhibit W: Comments of Dr. George Ice, P.H., C.F., R.P.F. (Oct. 20,
10 2003).

11 Exhibit X: Comments of the Pacific Lumber Company (Sept. 16,
12 2003).
13

14 Exhibit Y: California Department of Forestry and Fire Protection, A
15 Technical Review of the NCRWQCB Independent
16 Scientific Review Panel Phase II Report (Sept. 18, 2003).

17 Exhibit Z: Comments of California Forestry Association to the
18 North Coast Board (8/21/03).

19 Exhibit AA: North Coast Board, *Executive Officer's Summary Report*
20 *regarding Humboldt Watersheds Independent Scientific Review Panel*
21 *Phase II Report* (Aug. 5, 2003).
22

23 Alternatively, to the extent that the State Board may wish to consider
24 the foregoing documents as "additional" evidence under 23 Cal. Code Regs.
25 section 2050.6, CFA did not previously submit then to the Regional Board
26 because we understood from the Regional Board that we did not have to.

27 VI. CONCLUSION.

28 For all the foregoing reasons, the Regional Board's actions with

1 regard to the General WDRs and the Categorical Waiver are arbitrary,
2 capricious and contrary to law. CFA requests that the State Board amend
3 the General WDRs and Categorical Waiver or remand them for modification
4 as described above.

5

6 Dated: July 23, 2004.

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